IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO.9 OF 2005

Shri Mohamed Ali Mulla,
H. No.-587, Housing Board,
Gogol, Margao Goa
Presently in Sada Jail,
Vasco Da Gama. ...Applicant

V e r s u s

1. State of Goa,
   Through Public Prosecutor,
   Panaji Goa.

2. Mr. Raison Almeida,
   son of Hector Almeida,
   Resident of Adibandh,
   Cuncolim, Salcete Goa. ...Respondents

Mr. S. M. Volvoikar, Advocate for the Applicant-acused.

Mr. S. N. Sardessai, Public Prosecutor for the State-Respondent no.1, absent.

Mr. Arun Bras De Sa, Advocate for Respondent no.2.

CORAM: N. A. BRITTO,J.

DATE : 30th September, 2005

ORAL JUDGMENT

Heard Shri S.M. Volvoikar, the learned Counsel on behalf of the applicant and Shri Braz De Sa, the learned Counsel on behalf of respondent no.2. The applicant herein is accused who has been convicted and sentenced and whose sentence has

been confirmed by the learned Additional Sessions Judge, Margao by judgment/order dated 6.5.05, under Section 138 of the Negotiable Instruments Act, 1881(Act for short).

2. The applicant-accused had borrowed from the respondent no.2-complainant a sum of Rs.5,00,000/-(rupees five lakhs) on or about 26.5.2001. Subsequently, by way of repayment, the accused issued a cheque to the complainant dated 27.8.01 for the said sum of Rs.5,00,000/-drawn on Madgaum Urban Co-operative Bank, Ltd., Margao, but when the said cheque was deposited by the complainant into his account, it was returned dishonoured as a result of which the complainant addressed to the accused a legal notice dated 10.9.01 which the accused received on or about 14.9.01 and inspite of the said receipt, did not comply with the same as a result of which the complainant filed a complaint against the accused on 18.10.01.

3. At the hearing of this revision, three submissions have been made by Shri Volvoikar, the learned Counsel on behalf of the accused. The first is that on the offence alleged to have been committed by the accused under Sections 138 of the Act took place at a time when Sections 138 to Section 142 were not found on the Statute Book as the Banking, Public Financial Institutions and Negotiable Instruments Laws(Amendment) Act,

1988 by which they were introduced into the Negotiable Instruments Act, 1881 was repealed by the Repealing and Amending Act, 2001. The second submission is that the learned Judicial Magistrate could not have imposed imprisonment in default of payment of compensation of Rs.4,50,000/- and, the third is that the complainant had failed to prove that the complainant had served a proper notice, which is a condition precedent for initiation of proceedings under Section 138 of the Act, to the accused.

4. All the three submissions made on behalf of the accused are no longer res integra.

5. As far as the first submission is concerned, the same has been answered by a Division Bench of this Court, referring to Section 6A of the General Clauses Act, 1897 and Section 4 of the Repealing and Amending Act, 2001.

6. There is no dispute that Chapter XVII of the Negotiable Instruments Act, 1881, containing Sections 138 to 142 came to be introduced or incorporated in the said Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws(Amendment) Act, 1988(Act 66 of 1988) with effect from 1.4.1989. As regards this aspect, the learned Division Bench of this Court in the case of **K.K. Vasudeva Kurup v. The**

Union of India(AIR 2003 BOMBAY 64) observed that "it is clear that Parliament wanted to amend the original Act of 1881 by inserting Chapter XVII in the Act. For that purpose, and Amending Act of 1988 was enacted. As soon as the Amending Act of 1988 was brought into force implemented, the provisions of Chapter XVII(Sections 138 to 142) stood inserted in the original Act of 1881. Thus, from the date on which Amending Act had become law and brought into force, the provisions in the original Act stood amended containing Chapter XVII(Sections 138 to 142). The Amending Act thus served its purpose and object. Nothing was required to be done thereafter so far as Amending Act was concerned and was required to be repealed. The repeal of the Amending Act, however, does not affect the law which already stood amended". After referring to several decided cases, the learned Division Bench observed that the amendment made in the original Act of 1881 by the Amending Act 1988 remains in force and repeal of Amending Act in 2001 has not affected the amendment. Referring to the savings Clause in Section 4 of the Repealing an Amending Act, 2001, the Division Bench noted that Section 4 of the Repealing and Amending Act saves the operation of the amendments inserted in the original Act by the repealed Act, the amendments, therefore, are clearly covered by the savings clause of Section 6A of the General Clause Act read with Section 4 of jhe Repealing and Amending Act, 2001. The amendment in the original Act remains in operation and does not get abrogated. In the light of the

decision of the learned Division Bench of this Court in the said case of K. K. Vasudeva Kurup(supra), the first submission made on behalf of the applicant has got to be rejected.

7. As regards the second submission, on behalf of the complainant, Shri Braz De Sa has placed reliance on the case of **Hari Singh v. Sukhbir Singh and others((1988) 4 S.C.C. 551)** wherein the Apex Court has categorically stated that the order directing payment of compensation may be enforced by imposing sentence in default. Shri Braz Da Sa has also placed reliance on the case of **Suganthi Suresh Kumar v. Jagdeeshan (2002) 2 S.C.C. 420)** wherein the Apex Court has reiterated the principle by stating that the order passed by that Court in Hari Singh v. Sukhbir Singh(supra) was required to be followed by all Courts in India until it was overruled by a larger Bench of that Court. It may be stated that the imprisonment imposed is not by way of punishment but only as a mode of recovery to secure the payment of compensation ordered to be paid. In the light of the said two decisions of the Apex Court, the second submission also deserves to be rejected.

8. As regards the third submission, Shri Volvoikar contends that both the Courts below had failed to consider that the complainant had not identified the signature of the accused on the A.D. card produced by the complainant, by way of proof of service of legal notice sent and therefore it

could not be said that the accused has received the said notice. As regards this aspect, the learned Judicial Magistrate has observed, and in my view rightly, that mere suggestion of denial of receipt of notice in the cross-examination of the complainant was insufficient to dispute the receipt of the notice. The learned J.M.F.C. had also noted that the accused himself had chosen not to enter the witness box to deny the signature which was on the A.D. card was not his. The learned Judicial Magistrate observed, and in my view rightly, that the legal notice was sent at the same address as stated in the Hundi and it was not the case of the accused that he was not residing at the address given on the same. The learned Additional Sessions Judge has also considered this aspect and has stated that the legal notice of demand was having correct and proper address of the accused and was despatched at the address of the accused by registered post with acknowledgment due and therefore in terms of Section 27 of the General Clauses Act , 1897, there was a presumption that the notice was duly received by the addressee and it was not necessary for the complainant to prove that the signature on the A.D. card was that of the accused and it was for the accused to rebut the presumption available under Section 27 the General Clauses Act, 1897 which the accused had failed to rebut. The said observations of the learned Additional Sessions Judge are in tune with what has been stated by this Court in the case of the **Vasco Urban Co-op. Bank Ltd. v. Mrs. Shobha D. Korgaokar(unreported decision dated**

15/21of October 04) after referring to a number of decisions. This Court noted that if the presumption available under Section 27 of the General Clauses Act, 1897 can be imported in a case where notice is returned as unclaimed it can with equal force if not more, in a case where the postal article is received at the address of the accused whether it was received by the accused or any other member of his family. The third submission therefore has got to be rejected.

9. Lastly, Shri Volvoikar on behalf of the accused has submitted that both Courts below did not take into account the capacity of the accused to pay the compensation which was required to be taken note of in the light of the judgment in the case of Hari **Singh v. Sukhbir Singh and others (supra)** Shri Volvoikar has submitted that the learned Judicial Magistrate had in fact not passed any order in respect of the interest payable on the balance amount of Rs.4,50,000/- and costs and legal expenses incurred by the complainant in view of the agreement between the complainant and the accused by virtue of which the complainant had stated that he would be satisfied in case he had received the balance amount of Rs.4,50,000/- only. Shri Volvoikar submits that the Courts below ought to have considered giving instalment facilities to the accused since he was not in a position to pay the balance amount of Rs.4,50,000/- at one time and therefore this Court may consider giving a time of six months to enable the accused to

make arrangement to pay the balance in instalments.

10. No doubt, the Apex Court in the case of Hari Singh v. Sukhbir Singh and others(supra) has stated that the payment of compensation has got to be reasonable and what is reasonable will depend upon the facts and circumstances of each case and the quantum of compensation may be determined by taking into account the nature of the crime, the justness of claim by the victim and the ability of the accused to pay the compensation and reasonable period for payment of compensation, if necessary, by instalments may also be given. Admittedly, the prayer that the accused be given opportunity to pay the balance amount of Rs.4,50,000/- was not made by the accused either before the learned Judicial Magistrate or for that matter before the learned Additional Sessions Judge, Margao. The cheque issued by the accused was dated 27.8.01. The judgment of the learned Judicial Magistrate, First Class was pronounced on 19.9.03 and that of the learned Additional Sessions Judge was pronounced on 6.5.05. In my view, in case the accused had a will to clear his liability by instalments he could have done so all along the period which has lapsed. In my view considering the lapse of time and further considering that this plea is made for the first time before the Revisional Court, it can be accepted only to be rejected.

11. For reasons stated hereinabove, I find there is no merit in this

revision. Consequently, the same is dismissed. Shri Volvoikar requests for stay of the judgment. Request rejected. Needless to observe, the accused will have now to surrender to undergo the sentence imposed upon him.

N. A. BRITTO,J.

/vpf.